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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner.

v.

ADA COUNTY, IDAHO; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit below affirmed the decision of the District Court, invalidating application of a National Rule for which this Court has paramount need and exceptional importance for securing and maintaining national uniformity in decisions. The Panel's decision has created a notable conflict with other existing opinions entered by the U.S. Supreme Court, the Ninth Circuit, and other U.S. Courts of Appeals with respect to when claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) are an "absolute bar" to a constitutional violation actionable under 42 U.S.C. § 1983. The question presented is:

Whether the procedural due process protection analysis announced under *Zinermon v. Burch*, 494 U.S. 113 (1990), precludes the use of the doctrines of *collateral estoppel* and *res judicata* as an absolute bar to a federal claim, when State courts fail to provide any adequate procedural due process remedy, particularly when the federal claim was embraced in a county ordinance (authorized by State law), intending to give a classified employee procedural due process remedies, but instead, was held "constitutionally infirm" by the Idaho Supreme Court, which has stripped Petitioner of her protected employment property rights guaranteed under the Fourteenth Amendment of the U.S. Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following caption contains the names of all the parties to this proceeding:

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, IDAHO, a political subdivision of the State of Idaho; ADA COUNTY BOARD OF COMMISSIONERS, acting in its official capacity; ADA COUNTY SHERIFF'S OFFICE, acting in its official capacity; AND JOHN AND JANE DOES I through X, inclusive, individually and in their capacities as officials, employees and/or agents of ADA COUNTY, IDAHO, and acting under color of State Law,

Respondents.

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Stacy A. Gibson respectfully petitions the U.S. Supreme Court for a writ of certiorari to review the judgment and opinion rendered by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the Ninth Circuit is located in the Appendix at p. 2a. The February 28, 2006 Memorandum Decision and Order of the Ninth Circuit,, and the April 24, 2007 Memorandum Order of the District Court (Case No. CV05-263-S-EJL) are located in the Appendix at p. 20a-36a and p. 5a-11a, respectively.

JURISDICTION

The Ninth Circuit denied Ms. Gibson's petition for rehearing and rehearing *en banc* on March 31, 2008. Appendix, p. 1a. The certiorari petition is timely filed on July 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISION

United States Constitution, 14th Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of ... property, without due process of law."

STATEMENT OF THE CASE

A. Introduction & Overview

Petitioner, Stacy A. Gibson, was employed at the Ada County Sheriff's Office as a Jail Technician. Her Federal complaint claimed, *inter alia*, that Respondents, under color of law, violated her constitutional and statutory rights by depriving her of the right to engage in the procedural due process procedures of administrative agency review and subsequent judicial review concerning her classified employment property rights. *See* Complaint (Dkt. No. 1), Case No. CV05-263-S-EJL, ¶ 89-99[1]. This claim was made under the procedural due process protection analysis announced in *Zinermon v. Burch*, 494 U.S. 113 (1990), which provides a **constitutional violation** under 42 U.S.C. § 1983 is **not complete unless** and **until** the **state** has **failed to provide procedural due process remedies**, but once the § 1983 violation(s) is complete, it is **then actionable** in a **federal** district **court**. *Id.* at 126. The Federal District Court dismissed Gibson's claim (p. 20a-36a), awarded attorney fees to Respondents (p. 5a-11a), and the Ninth Circuit affirmed (p. 2a-4a).

B. Facts Relevant to Petition

Ms. Gibson became employed as a Records Technician with the Ada County Sheriff on July 10, 1997, and received vested property rights by virtue of her classified permanent status as an employee of

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[1] U.S. District Court, District of Idaho; www.id.uscourts.gov

Ada County, accrued tenured status, and was afforded protection under the Ada County Personnel System (Merit System), identified in § 1-7-1 through § 1-7L-10, Ada County Code (A.C.C.). Gibson received full "Permanent Status" employment, effective July 1, 1998, and granted permanent status as a "classified employee", pursuant to § 1-7E-2A & B, A.C.C., whereupon all rights, benefits and privileges vested, constituted protected property rights for constitutional purposes.

Gibson was promoted to Jail Technician and transferred to the main facility October 16, 1998. Before transfer, her gross monthly wage was $1,500.00, then being directly deposited by Payroll into a joint checking account with her husband. She never saw nor ever endorsed any wage checks, as her wages were processed under the County's automatic Direct Deposit Program.

In November, 1998, instead of entering Ms. Gibson's new wage of $1,575.00 per month, as required under the promotion, County Payroll entered $1,550.00 per month, and programmed the computer system to pay Gibson based on half the wage for her old job (Records Technician) for October 1-15, 1998, and half the new wage (Jail Technician) for October 16-31, 1998. That "mixed" wage information for October was placed into a "tickler file", but Payroll failed to remove the reference to Gibson's old wage, and began disbursing full payment on both positions for November 1998 through June 1999.

As the false entries continued, the errors grew proportionately. An erroneous figure, $3,050.00, along with the $1,550.00, began appearing on the pay voucher, but those monthly vouchers were regarded a

computer signal only, not to be taken as an accurate accounting statement. Unknown at the time, the payroll voucher proved to be wrong in every respect; it had a miscalculation of regular wage; a continuing underpayment of overtime wage, and was then used to authorize the computer to deposit an unearned wage into the checking account. This mix of miscalculations and errors continued for eight (8) months (November, 1998 through June, 1999), and went undetected by Payroll and unknown to Ms. Gibson or her husband. Consequently, Payroll deposited the accumulated "overpayment" of $8,528.89, but that "overpayment" was incorrect, as the shortage on regular pay and misuse of the 7(k) exemption on overtime was not factored into the accounting. Payroll Technicians never regarded the accounting process accurate, yet notwithstanding, Payroll personnel responsible for knowing what regular and overtime wages were owed, incorrectly claimed $8,528.89 had been mistakenly overpaid to Gibson, without providing any accounting of all wage categories for regular and overtime wages.

In part, accruing errors were Ada County's failure under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 211(c), where the duty to keep and maintain accurate wage and benefit records is established, and was an inexcusable failure of the County to comply with federal law. The County's ongoing misuse of § 207(k) exemption, dating back to the "1993 to 1995"[2] era, and was a known violation by Payroll.

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[2] Further discussion concerning Ada County's willful misclassification of Jail Technicians being "exempt under 29 U.S.C. § 207(k)" was revealed sometime between "1993 to 1995",

Taken as it was, the County's non-conforming, non-compliant record-keeping system resulted in a variety of FLSA wage violations (§ 211(c)), and with respect to Gibson, the errors were both the underpayment and overpayment of regular wage, an unlawful retention of overtime wages (§ 207(k)), and the erroneous deposits placed into a joint account through Ada County's Direct Deposit Program.

Initial discovery of errors occurred July 19, 1999, as Payroll determined overtime wages were due a group of employees, but different than the § 207(k) violation. Payroll relayed a facsimile transmission to the Sheriff's Budget Director, identifying nine (9) Sheriff employees thought "shorted" overtime wage, from October 1998 through June 1999. This related to a "grant" fund category. Gibson was listed among those nine (9) employees, and thought she was owed overtime wages. When the Budget Director reviewed the list, she believed Gibson was underpaid overtime wages, but that list addressed grant funds, and Gibson was not receiving wages from a grant fund source. The Director revealed she was "working on a problem with a grant".

With the July 19th discovery, further errors of payments were discovered in Payroll, and that unleashed the confrontation that began the afternoon of July 20, 1999 with Ms. Gibson, who, while on medical leave, at home, received a call from a Sheriff detective who requested she come to the Sheriff's Office. Ms. Gibson came, thinking she had been selected for another work assignment, due to her

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and the County's concealment of this information can be found on page 54 of Gibson's Opening Brief in the Ninth Circuit.

special course study. These detectives, for two and one-half (2 ½) hours, gruesomely interrogated Gibson over these wage errors, and contrary to Sheriff Office policy, threatened her and used intrusive criminal techniques, calling her a thief, a liar, claimed she collaborated with others to cause these overpayments to be deposited into the joint checking account; threatened her with criminal prosecution, claiming she committed a felony, said she would be incarcerated, would loose her job, and suffer destruction of her career. Ms. Gibson was devastated by the false accusations, felt helplessness, feared for her safety and her career, felt her future and her life were destroyed, all caused from wage errors expressed in threats by these trained interrogationists who pummeled vicious threats at her. She had done none of what they accused her of doing.

These detectives truly knew Gibson had no involvement in the overpayment issue; they knew it was caused from County errors and their automatic Direct Deposit Program, and Payroll's record-keeping was known to be wrong; that Payroll said they would correct their errors, and it was not an employee responsibility. She told these detectives if wages had been erroneously deposited to the joint account, the County could take her accrued comp, overtime, holiday and vacation time to offset any confirmed overpayments. The County expressly had the power and authority to debit the joint account under the Direct Deposit Program as well. Ms. Gibson spoke out about the FLSA violations, the false accusations, the improper proceeding, their malicious threats, and because of the County's FLSA record-keeping and

accounting violations, she asked (politely demanded) a full accounting and reconciliation of her wages be performed, to determine who owed what amount to whom, and what pay reduction, if any, was necessary. Ms. Gibson was suspended July 20, 1999.

On July 23, 1999, without providing Ms. Gibson any notice or opportunity for a pre-termination hearing, Ada County prepared Personnel Action, entitled: "Notice of Intent to Terminate", "Effective 7/23/99". The Sheriff authorized and signed his "Special Investigations Disposition" form on July 28, 1999, and specifically stated: "Initiate Termination Proceeding". On July 28, 1999, the Sheriff's Legal Advisor then called Ms. Gibson's counsel (her husband retained counsel) and stated the Sheriff wanted Gibson terminated immediately, but would allow her to resign, and if she refused to resign, the County would undertake to process felony charges against her for grand theft, and terminate her anyway. By federal law, threats and conduct of this nature are *de facto* termination, as it was done without providing Ms. Gibson procedural due process.

Gibson's attitude over her innocence was absolute and resolute; she felt the County must accept their fault for the flawed wage and benefit record-keeping violations; she would not resign her career for which she had worked so hard to achieve, and she would not allow her job be stolen from her, and wanted the appropriate venue of a due process hearing to challenge this wrongful conduct of County officials. Realizing there was no possibility of resignation, on August 2, 1999, Sheriff Killeen served Ms. Gibson with his Notice of Intent to Impose Discipline,

stating it was his intent to "terminate her employment", claiming she violated Ada County Code, § 1-7G-3A(5) and § 1-7G-3A(20) and § 9.04 of the Sheriff's Policy Manual. Once again, this type of conduct equates to *de facto* termination.

On August 6, 1999, as provided for in § 1-7G-3C, Ada County Personnel System, Ms. Gibson appealed the decision of the Sheriff's intent to terminate her employment, and denied any violation of the Personnel System, the Sheriff's Policy Manual or any Statutes of Idaho; there was no lawful basis to terminate; no probable cause to prosecute, and Gibson wanted whatever "informal hearing" was authorized under § 1-7G-3D, A.C.C., Ada County Personnel System. When Gibson served the Sheriff with that August 6th request to engage a *Loudermill* hearing, the Sheriff's attitude became intensified, and in keeping with the threat conveyed by his Legal Advisor on July 28th, the Sheriff engaged in more direct retaliation and discrimination against Gibson with an advancing threat of prosecution through the Ada County Prosecutor's Office.

On August 9, 1999, the Sheriff had Greg H. Bower, Ada County Prosecutor, send a letter to the Chief Criminal Prosecutor with Canyon County, Idaho, stating he had authorization "to file charges in this case...". Such "authorization" was not authorized by §31-2603(a), *Idaho Code*; that letter was deemed to carry forward the Sheriff's threat to frighten Ms. Gibson into resigning. This conduct was seen as being malicious, discriminatory, and retaliatory, pursued only to get Gibson to relinquish her property right, and such conduct, by federal law, is

de facto termination, impugning Gibson's property rights without procedural due process.

On August 11, 1999, the Sheriff's Legal Advisor acknowledged Ms. Gibson's right to a *Loudermill* due process hearing, acknowledged Gibson had a documented medical condition, acknowledged Gibson had been overpaid in error, and advised Gibson she would receive wages owed her.

On August 20, 1999, Mr. Christensen, the Canyon County Chief Criminal Prosecutor, announced his conclusion criminal charges against Ms. Gibson were "inappropriate".

Then, on August 25, 1999, without allowing Gibson any procedural due process remedy, the Legal Advisor unilaterally placed her on administrative leave, without pay, canceled her medical benefits (well-knowing she was under doctor's care), and ignored Ms. Gibson's good faith efforts to cooperate with a negotiated leave status (during the course of appropriate due process), as long as the critically needed insurance benefits continued. Of interest, this leave status was not only imposed in contradiction to § 1-7G-3B(5), A.C.C., a provision uniquely mandating there can only be paid leave, till a written decision was issued (that was December 27, 1999), but also, by virtue of federal law, such unilateral action was *de facto* termination, as there had been no procedural due process remedy provided. *See Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 10-11, United States District Court, M.D. Pennsylvania, August 26, 2005; *Gilbert v. Homar*, 520 U.S. 924, 930; *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996), and suspensions without pay are adverse employment actions. *See*

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

On December 27, 1999, the Sheriff issued his written order terminating Ms. Gibson without allowing her to participate in any pre-termination hearing, required not only by the County Code, but a specific mandate announced by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). There was to be **NO** hearing (formal or informal), as the Sheriff stated in his order of December 27, 1999: "I do not believe that an informal meeting is the procedure contemplated by the County Code at 1-7G-3, nor do I believe such a meeting would be productive".

On January 4, 2000, Gibson appealed this termination pursuant to § 1-7G-3L, A.C.C.808), and requested a hearing. The hearing Gibson received with the Ada County Personnel Hearing Officer, January 25th and 26th, 2000, was never seen to be intended as an unbiased "post"-termination hearing by an authorized agency. It was only a "seal of approval" by the County Personnel Office for what the County Sheriff did in his unilateral arbitrary discretion. On February 15, 2000, the County authorized Hearing Officer rendered his decision that not only sustained the termination of Ms. Gibson's employment, but sought to include further basis to terminate, none of which claimed by the Sheriff or identified in any notice to terminate or decision of termination. With the discovery restraints and overreaching efforts of another County official to endorse approval, the process became questioned and later judicially declared to be infirm!

Ms. Gibson appealed that decision to the district court in accordance with the instructions and provisions of § 1-7G-3O, A.C.C. (p. 47a). The lower court left the termination in place by order of May 7, 2001, another curious result. Appeal was taken to the Idaho Supreme Court under Docket No. 27605, and on May 28, 2003, the decision in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003) was rendered, the effect of which vacated the lower court's decision, ordered the matter dismissed, without prejudice, and found that provision of the County Code (§ 1-7G-3O, A.C.C.) (p. 47a) constitutionally infirm, and therein stated:

> "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the decision would be an appropriate subject for judicial review and the IAPA [*Idaho Administrative Procedures Act*] standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable".
>
> "ACC § 1-7G-3 (o) is not a "statute" within the meaning of (I.R.C.P.) 84 [Idaho Rule of Civil Procedure], and thus cannot authorize judicial review. Because ACC § 1-7G-3 (o) is not a statute, yet it attempts to authorize judicial review of a personnel hearing officer's decision, it conflicts with I.R.C.P. 84 and is, therefore, infirm".

> "The **ACSD** [Ada County Sheriff's Department] **has not prevailed** on the **merits** in this matter. **In fact**, it is the **infirm appeal provision** of **A.C.C. § 1-7G-3 (o)**, incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, **which has prevented this Court** from **addressing** the **merits of this matter**. As a result, the matter is dismissed *without prejudice* and the **ACSD is not a prevailing party**..." (Emphasis added).

C. Federal District Court Proceedings

On July 5, 2005, Gibson filed suit, alleging a single cause of action against Respondents for relief under 42 U.S.C., § 1983 for violation(s) of procedural due process, constitutional rights and statutory rights, under color of State law, by depriving her of any forum for engaging a due process hearing. Respondents had stripped Gibson of her right to agency review and subsequent access to judicial review over the infringement of her employment property rights. The Court issued the Litigation Order on July 12, 2005. Respondents filed their motion and memorandum to dismiss (Rule 12(b)(1) and (6), Fed. R. Civ. P.), on July 20, 2005. In their pleadings, Respondents argued Gibson's claim was barred by the Rooker-Feldman Doctrine, barred by the issue and claim Preclusion Doctrines, barred by the lapse of the applicable statute of limitations, and entitled to be awarded attorney fees and costs.

On August 18, 2005, Gibson submitted her

objection and response to Respondent's motion to dismiss, and therein refuted Respondent's contentions and specifically stated:

> "Based upon the foregoing arguments, Plaintiff would request this Court deny Defendants' Motion to Dismiss this action, as Plaintiff's cause of action was not submitted to this Court as an appeal of previous litigation from any Idaho State Court; that this action is a new cause which accrued on July 2, 2003, for which no damage claim or recovery of damages has been sought in the State Court cases for the civil rights infringements involved. Plaintiffs should not be precluded from her cause of action by *res judicata* or *collateral estoppel*, as Plaintiff's action is separate and apart from any of the Idaho State Court proceedings, and the action is not barred by any limitations statute, as the action was timely filed under the two-year statute of limitations pursuant to § 5-219(b), Idaho Code."

This action was created by the July 2, 2003 communication of the County Commissioners which deprived Ms. Gibson of any right to participate in a procedural due process hearing, and any subsequent judicial review of the Sheriff's termination of Gibson's employment property rights. On August 25, 2005, Respondents submitted a further memorandum arguing:

> **"Gibson's Unsuccessful Attempts to Obtain Relief at the State Court Level Preclude This Action"**, and
>
> **Since she has been unsatisfied with her previous results, she now wants this Court to step in and override the state court proceedings."**

Gibson submitted a response on September 16, 2005, stating:

> "Plaintiff would request this Court deny Defendants' Motion to Dismiss, as Plaintiff's cause of action is not an appeal of any previous litigation from any Idaho State Court. This action is a new cause accrued on July 2, 2003, for which no damage claim or recovery of damages has been sought in any State Court case for the civil rights due process-equal protection infringements involved. The Rooker-Feldman Doctrine does not apply to the facts in this case. Plaintiff should not be precluded from her cause of action by *res judicata* or *collateral estoppel*, as Plaintiff's action is distinctly separate and apart from any of the Idaho State Court proceedings, and the action is not barred by any limitations statute, as the action was timely filed under the two-year statute of limitations pursuant to § 5-219(b), Idaho Code (weekends and holidays are the reason for the July 5th filing date)."

In reply, Respondents stated on September 19, 2005:

> "Gibson's Further Response fails to disclose that *Gibson v. Ada County*, Case No. CV OC 0305850D, Idaho 4th Dist. Ct. [filed in State Court], was filed by Gibson directly in response to the July 2, 2003, letter from the Board of Ada County Commissioners".

The Federal District Court entered its Scheduling Order September 30, 2005 (p. 37a-44a), and specifically provided the parties a **right to amend pleadings**, and a deadline for amended pleadings to be filed, **on or before March 1, 2006**.

On February 28, 2006, despite the amended pleadings timely filed by Gibson on March 1, 2006, the District Court entered a Memorandum Decision and Order and Judgment (p. 20a-36a), granting Respondents' motion to dismiss, and dismissed Gibson's action in its entirety, based upon issue-claim and *res judicata-collateral estoppel* conjectures, and stated when the statute of limitations accrued. The Federal District Court stated:

> "Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior *state court actions* between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted." p. 30a-31a. Emphasis added.

As granted by the District Court's Scheduling Order (37a), Gibson amended the pleadings March 1, 2006, to more appropriately conform the existing facts with applicable and prevailing federal law. On March 1, 2006, after the District Court entered its Memorandum Decision, Order, and Judgment, Gibson filed various documents (including summary judgment pleadings, relative to the amended pleadings, filed contemporaneously with that Motion to Alter or Amend Judgment, and filed a courtesy Motion to Grant Gibson the Right to Amend Pleadings, though such right was previously ordered in the Scheduling Order. p. 37a-44a.

The Motion to Alter or Amend Judgment was filed under Rule 59(e) and 60(b), Fed. R. Civ. P., as it was Gibson's belief the District Court mistakenly concluded the facts and law, based (in part) upon Respondents conduct to distort the issues as the basis for the Sheriff terminating Gibson from her employment, withholding evidence concerning wages owed Gibson, and ongoing lack (by the State itself) to provide any adequate state due process procedure to seek agency or judicial review of the termination and the infringement upon vested property rights.

The District Court entered its Order on June 6, 2006 (12a), denying Gibson's Motion to Alter or Amend, and then chose to award costs and fees to Respondents (p. 18a; 5a-11a) because Gibson had filed her amended pleadings. Gibson thereupon timely filed her Notice of Appeal, to invoke appellate review with the Ninth Circuit Court of Appeals.

D. Ninth Circuit Proceedings

The four (4) issues presented to the Ninth Circuit for appellate review were:

> **I.** Whether the District Court erred when dismissing the action, and held Appellant's Title 42, § 1983 action was precluded under issue and claim preclusion, and *res judicata-collateral estoppel* defenses.
>
> **II.** Whether the District Court erred when dismissing the action, contending Appellant's claim accrued under Title 42, § 1983, and precluded by statute of limitations on February 15, 2002.
>
> **III.** Whether the District Court erred when entering its Order and Judgment, prior to allowing Appellant the right to exhaust the conditions conferred under the Court's Scheduling Order, authorizing amended pleadings, on or before March 1, 2006.
>
> **IV.** Whether the District Court erred when denying Appellant's Motion to Alter or Amend Judgment, then awarding fees and costs against Appellant, and denying right to amend complaint, knowing Appellees violated Appellant's Constitutional rights under the 14th Amendment by failure to provide an adequate state due process procedure to review property rights in classified, tenured employment.

On appeal, the Ninth Circuit Panel affirmed the District Court's Judgment (p. 2a-4a), finding Gibson's earlier litigation in Idaho state courts an "absolute bar" to her Federal § 1983 claim, under the doctrines of *res judicata* and *collateral estoppel*. P. 3a-4a.

Gibson requested a Panel Rehearing, and Rehearing En Banc, but that request was denied. p. 1a.

REASONS FOR GRANTING PETITION

This case presents a question of national legal and societal importance this Court needs to address. This Court should grant the petition to resolve the conflict with other existing opinions entered by the U.S. Supreme Court and other U.S. Courts of Appeals, regarding whether litigation in Federal Court for procedural due process protection, can be precluded with the use of state doctrines of *res judicata* and *collateral estoppel* to constitute an absolute bar to a federal claim, **when State courts fail to provide any adequate procedural due process remedy**, especially when the enactment of a merit system county ordinance (authorized by State law) was enacted to vest a classified employee with procedural due process remedies, but is declared by the Idaho Supreme Court to be "constitutionally infirm", stripping the employee of those constitutionally protected employment property rights guaranteed under the Fourteenth Amendment of the U.S. Constitution.

The Ninth Circuit's Opinion Conflicts With This Court's Procedural Due Process Protection Precedent Announced In *Zinermon v. Burch*, 494 U.S. 113 (1990), It Conflicts With the Ninth Circuit's Own Opinion in *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 956 (9th Cir. 1991), and It Creates a Divergence Among Eight Other Circuits.

The Equal Protection Clause of the 14th Amendment of the U.S. Constitution, and Article I, §§ 2 and 18 of the Idaho Constitution, require relief be granted to afford due process in reviewing any infringement on a property right. Under both Constitutions, the government was instituted for equal protection and benefit of the people, and the Courts were established to be open to every person, and a remedy afforded for every injury of person, property or character. *See* 14th Amendment, U.S. Constitution; *see* §§ 2 and 18, Article I, Idaho Constitution. *See* Idaho Supreme Court Opinion in *Luttrell v. Clearwater Co. Sheriff's Office*, 140 Idaho 581, 585, 97 P.3d 448 (2004).

The purpose of claim preclusion is to prevent relitigation of a claim previously tried and decided in a prior suit between the same parties. *See Littlejohn v. U.S.*, 321 F.3d, 915, 920 (9th Cir. 2003); *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1160 (9th Cir. 2002); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992); *McClain v. Apodaca*, 793 F.2d 1031 (9th Cir. 1986); *Parklane Hosiery Co., v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979). Ms. Gibson is not re-trying the State's failure to provide due process; she has embraced it, and has accepted that

failure as being that which has given rise to this federal cause of action, as that failure is a condition precedent to the Federal claim, not a preclusion of it.

In *(v. U.S.*, 321 F.3d, 920, the court (citing *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320) announced the following factors to determine if successive lawsuits involve the same "cause of action":

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action;
>
> (2) whether substantially the same evidence is presented in the two actions;
>
> (3) whether the two actions involve infringement of the same right; and
>
> (4) whether the two actions arise out of the same transactional nucleus of facts.

The court stated:

> "This cause of action analysis is unnecessary, however, **when a ground of recovery** or defense **could not have been asserted in the prior action**. *See* id. at 1321. In such cases, the defense or **ground of recovery falls outside the scope of claim preclusion**. Id.; see also Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205." (Emphasis added).

The Federal District Court Decision held Ms. Gibson's Title 42 § 1983 action was (1) precluded under issue and claim preclusion (*res judicata-collateral estoppel*) defenses; (2) precluded by application of a statute of limitations that Gibson's claim accrued February 15, 2000; and, (3) was dismissed, notwithstanding the fact Gibson was not allowed to exhaust a procedural right conferred under the Court's Scheduling Order (p. 37a-44a), authorizing amendment of pleadings on or before March 1, 2006. Gibson amended the pleadings because of the Idaho Supreme Court decisions announced in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003), and *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), the specific effect of which held that **no Idaho statute existed to authorize judicial review of a decision where a classified County employee's property right is affected by termination.** These decisions created Gibson's federal claim for the violation of her procedural due process and equal protection rights under the U.S. Constitution, and as in *Zinermon v. Burch*, there is no available State venue to address Ms. Gibson's right to review, **at which time Gibson became vested with a cause of action and right to file a claim in federal court (not a state court)** under Title 42 U.S.C. § 1983.

Once the court filed its decision in *Terlecky v. City of Ruidoso Downs*, Case No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006, Gibson thought it best to file amended pleadings to better

comport the comparable issues identified in *Terlecky v. City of Ruidoso Downs* with the facts of her claim.

In *Terlecky*, plaintiff and counsel was aware no State remedy authorized judicial review of his termination, and suit was filed directly in Federal Court. Ms. Gibson believed she had a forum for review under the County Ordinance, § 1-7G-3O, Ada County Code (A.C.C.), and did, in good faith, seek to use the due process avenue created (p. 47a) through Idaho State courts, though later held to be "infirm" by the Idaho Supreme Court.

Issue and claim preclusion have no application in this dispute, as the cause of action came into being **because** of the Idaho Supreme Court decision(s) there was no statute (or ordinance) to afford a venue or procedure for due process review. This Federal claim accrued and became actionable only **after** and because ("unless and until") Petitioner was deprived of any adequate State due process remedy, **not** because the State has provided an adequate due process remedy, but dissatisfied with the decision over the relief provided. This Federal claim never existed until the Idaho Supreme Court entered its decisions in *Gibson v. Ada County Sheriff's Department*, 72 P.3d 845, and *Gibson v. Ada County, et al.*, 133 P.3d. 1211. *See Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000) and *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000).

In accordance with the Ninth Circuit's holding in *Littlejohn v. U.S.*, and *Clark v. Bear Stearns & Co.*, cause of action analysis is unnecessary and outside the scope of claim preclusion when grounds for recovery could not have been asserted previously.

Gibson's claims for recovery in Federal Court did not exist **until** the Idaho Supreme Court's decisions became complete in *Gibson v. Ada County Sheriff's Department*, 72 P.3d 845 (2003), and *Gibson v. Ada County, et al.*, 133 P.3d 1211 (2006). *See also Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205.

In *Zinermon*, 494 U.S., at 125-126, the U.S. Supreme Court reviewed the necessary elements of a procedural due process claim:

> "A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; **it is not complete unless and until the State fails to provide due process.**
>
> Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided**, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the **statutory or administrative procedure** of effecting the deprivation, and **any remedies for**

> **erroneous deprivations** provided by statute or tort law." (Emphasis added).

In *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, the Ninth Circuit Court, with assistance from *Zinermon*, held that in procedural due process claims: "the violation does not occur and is therefore not actionable "unless and until the State fails to provide due process." *See also* Ninth Circuit's statements regarding procedural due process in *Kildare v. Saenz*, 325 F.3d 1078, 1085.

Petitioner's Complaint was filed with the Federal District Court on July 5, 2005 because "the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim." *See Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000), and when State courts fail to provide an adequate remedy for a procedural due process violation, then **only a Federal District Court**, not a State court, **can remedy the violation**. *See Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000).

The case of *Terlecky v. City of Ruidoso Downs*, is remarkably identical to this instant matter concerning the failure of a State to provide an adequate due process remedy to a public employee vested with property rights in employment. Gibson reported those telling elements of striking similarity to the Ninth Circuit in her Reply Brief, as follows:

> 1. Ms. **Gibson** was hired as a Deputy Sheriff (Records Clerk) with the Ada County Sheriff's

Office, July 10, 1997, promoted to Jail Technician and vested with classified employment; **Terlecky** was hired by the Ruidoso Downs Police Department, August 3, 1989, and later promoted to Sergeant, a classified position;

2. Ms. **Gibson's** employment with the Ada County Sheriff's Office was governed by and subject to Ada County's Merit System (Personnel System) and the Ada County Sheriff's Office Policy manual, which created an implied contract of employment; **Terlecky's** employment with the City of Ruidoso Downs Police Department was governed by and subject to the City of Ruidoso Downs Personnel Policy Manual and Ruidoso Downs Police Department Policy and Procedure Manual, which created an implied contract of employment;

3. As part of its Merit System, **Ada County** has written policies establishing applicable procedures in situations, including termination; as part of its Personnel Manual, the **City of Ruidoso Downs** has written policies establishing applicable procedures in situations, including termination;

4. **Ada County's** Merit System established property rights under the laws of the State of Idaho, and Ms. Gibson was entitled to due process of law in the te. nination of her employment; the **City of Ruidoso Down's**

Personnel Manual established property rights under the laws of the State of New Mexico, and Terlecky was therefore entitled to due process of law in the termination of his employment;

5. Under Ms. **Gibson's** contract she was subject to termination only for cause; under **Terlecky's** contract he was subject to termination only for cause;

6. By virtue of Ada County's Merit System, Ms. **Gibson** had a property right and a legitimate expectation under Idaho law of continued employment, and Ms. Gibson was entitled to due process in the termination procedure; that by virtue of the City's Manual, **Terlecky** had a property right in his legitimate expectancy under New Mexico law of continued employment, and Terlecky was therefore entitled to due process in the termination procedure. *See also Goldberg v. Kelly*, 397 U.S. 254 (1970);

7. The termination of Ms. **Gibson's** employment without prior notice of all charges against her, and without a meaningful opportunity to participate in a pre-termination hearing, or a meaningful opportunity for an unbiased post-termination hearing, was in violation of Ms. Gibson's property rights under the Due Process guarantees of the 14th Amendment of the United States Constitution; the termination of **Terlecky's** employment

without providing him prior notice of all charges against him, and without a meaningful opportunity to call and/or cross-examine witnesses before a neutral judge, was in violation of Terlecky's property rights under the Due Process guarantees of the 14th Amendment of the United States Constitution;

8. Because **Ada County** alleges the final authority in personnel matters is the elected official (Sheriff) by which Ms. Gibson was employed, the violation of Ms. Gibson's due process rights may be said to be the representation and execution of the policies or customs of Ada County; because the **City of Ruidoso Down's** alleges final authority in personnel matters is the Mayor and Trustees, the violation of Terlecky's due process rights may be said to be the representation and execution of the policies or customs of the City of Ruidoso Downs. *See also Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157 (10th Cir. 2003); *Miller v. City of Mission*, 705 F.2d 368 (10th Cir. 1983);

9. In depriving Ms. **Gibson** of her property rights, Respondents were acting under color of state law as well as the ordinances, rules, regulations, and customs of Ada County; in depriving **Terlecky** of his property rights, Defendants were acting under color of law as well as the ordinances, rules, regulations, and customs of the City of Ruidoso Downs. *See*

also Vinyard v. King, 728 F.2d 428 (10th Cir. 1984);

10. **Ada County** had a duty to act in good faith and to deal fairly with Ms. Gibson in connection with Ms. Gibson's implied contract of employment; the **City of Ruidoso Downs** had a duty to act in good faith and to deal fairly with Terlecky in connection with Terlecky's implied contract of employment;

11. Ms. **Gibson** should be immediately returned to employment at the Ada County Sheriff's Office, with rank, seniority, benefits, privileges, entitlements and back pay, retroactive to August 25, 1999, when she was placed on administrative leave without pay; as **Terlecky** was immediately returned to the City's police force at the same grade and pay with all cost-of-living increases given to other officers prior to his return to work; and,

12. Ms. **Gibson** should recover costs and legal fees in accordance with law; as **Terlecky** recovered costs and legal fees in accordance with law.

Also, in *Terlecky*, January 24, 2006 Memorandum Opinion and Order, page 6-7, the Federal District Court denied defendants' (state actors) motion for summary judgment, and District Judge Black stated:

"The above result is not affected by Defendants' argument that Plaintiff's

> [Terlecky] due-process claim must fail because he did not pursue an appeal to state district court, as the personnel manual authorized him to do. It is true Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct appeal allowed by the City's personnel manual. *See Zamora v. Village of Ruidoso Down*, 907 P.2d 182, 184 (N.M. 1995) (unless otherwise provided by statute), correct procedure to appeal from administrative employment decision is to petition district court for writ of certiorari. However, the Tenth Circuit has specifically held that the availability of a remedy in state court, and the employee's failure to utilize that remedy, does not preclude a due-process claim, although the availability of such a remedy is "relevant to the question of what process" was provided to the plaintiff. *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 519."
>
> "If it is determined that the City's procedures are constitutionally defective .... an on-the-record state court action would not provide an opportunity for Plaintiff to remedy those shortcomings. The Court cannot hold as a matter of law that the availability of review in state court renders the City's procedures constitutional."

"**Unless and until**" the State provides Ms. Gibson procedural due process, Gibson has absolutely been denied any adequate State remedy to exercise her

procedural due process rights, and cannot effectuate that constitutionally guaranteed right, as shown by the Idaho Supreme Court opinion in *Gibson v. Ada County Sheriff's Department*, 72 P.3d, and *Gibson v. Ada County, et al.*, 133 P.3d. It is only after the 2006 decision Petitioner's Federal claim became "complete and actionable" and Ms. Gibson appropriately filed her Complaint with the Federal District Court.

In *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, at 956, the Ninth Circuit held procedural due process claims, "does not occur and is therefore not actionable "unless and until the State fails to provide due process.'" This is now the exact position Gibson found herself to be in, and left in that vacuum, and the Idaho State Court decision(s) do not constitute a bar to this cause of action, but gives rise to the very existence of the claim to seek the redress for the procedurally flawed deprivation of protected interests. When a claim could not exist until a State fails to provide the needed due process, there could be no issue preclusion or claim preclusion, as there has been no decision on the merits forthcoming from a due process review. Ms. Gibson is **not** attempting to re-litigate whether there has been denial of due process, rather the denial is apparent and has been embraced and confirmed, and now only a Federal Court can remedy the violation. *See Horton*, supra. Gibson has given the State court every opportunity to provide her due process, and requested the State courts remedy the procedural failings, just as stated in *Cotton v. Jackson*, 216 F.3d 1328, 1331:

> "the state must have the opportunity to "remedy the procedural failings of its

> subdivisions and agencies in the appropriate fora – agencies, review boards, and state courts" before being subjected to a claim alleging a procedural due process violation."

Clearly, the Idaho Court has been given several opportunities to remedy the procedural failings of its subdivisions and agencies, being asked to mandate the appropriate forum, be it an agency, review board, or a State court, and having failed to remedy the procedural failings, these Defendants-Respondents are now subject to this procedural due process violation that **only** a **Federal Court can remedy such claim** now before it. There could be no dispute the State court has provided no remedy to this procedurally flawed deprivation of a due process protected interest, and neither the McKinney Rule[3] nor the preclusion defenses apply. There has been no issue decided on the merits of Ms. Gibson's claim to constitute a basis to create a bar to this claim.

The Ninth Circuit has now created conflict with decisions it before made, and notably, contradicts its own case rule with respect to whether claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) are an "absolute bar" to a claim when state due process review has been unavailable. *See Kildare v. Saenz*, 325 F.3d 1078 (9th Cir. 2003); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 956 (9th Cir. 1991).

Federal courts have extensively relied on *Zinermon*, 494 U.S., to determine procedural due process violations and accrual of actions. This Court

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[3] *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

will take notice of recent cases decided by ***Federal District Courts***, identifying constitutional violations actionable under 42 U.S.C. § 1983, as declared by the Supreme Court in *Zinermon*. *See Brown v. Lewisburg City Court*, Case No. 1:08CV332, page 7, U. S. District Court, M.D. North Carolina, June 9, 2008; *Spivey v. Woodall*, Case No. 07-2629-JDB/dkv, page 6, U. S. District Court, W.D Tennessee, May 5, 2008; *Washington v. Ladue School District Board of Educ.*, Case No. 4:08CV21 HEA, pages 10-11, U.S. District Court, ED. Missouri, April 30, 2008; *Wilson v. City of Newark*, Case No. 06-DV-5219 (DMC), page 7, U.S. District Court, New Jersey, March 24, 2008; *Bayer v. Town of Peshtigo*, Case No. 05-C-661, at 7, U. S. District Court, E.D. Wisconsin, September 11, 2006; *Koltonuk v. Borough of Laureldale*, Civil Action No. 05-0106, at 14-15, U. S. District Court, E.D. Pennsylvania, July 18, 2006; *Day v. Borough of Carlisle*, Civil Action No. 1:CV-04-1040, at fn7, U. S. District Court, M.D. Pennsylvania, July 10, 2006; *Price v. City of Ormond Beach*, Case No. 6:05-cv-1064-Orl-31KRS, at 8-10, U. S. District Court, M.D. Florida, Orlando Division, May 19, 2006; *Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 14, U. S. District Court, M.D. Pennsylvania, August 26, 2005; *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, at 1368, N.D. Georgia, March 28, 2002. ***See especially Terlecky v. City of Ruidoso Downs***, Case No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006 and ***Willis v. Township***, Case No. 1:07-CV-0949, pages 14-15, U.S. District Court, M.D. Pennsylvania, March 5, 2008.

Our analysis of how **Terlecky** relates to this case (pages 24-29 above) shows how Federal Courts make legal conclusions by the due process precedent and holding made in *Zinermon v. Burch*. Another recent decision confirms how *Zinermon* due process precedent is applied when states fail to provide procedural due process remedies. In ***Willis v. Township***, Case No. 1:07-CV-0949, at pages 14-15, U.S. District Court, March 5, 2008, the Federal Court stated:

> "Before a plaintiff may successfully assert a procedural due process claim, the plaintiff must take "advantage of the processes that are available to him or her, unless those procedures are unavailable or patently inadequate." Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). This court has held that "a state provides constitutionally adequate procedural due process when it provides 'reasonable remedies to rectify a legal effort by a local administrative body.'" Desi'z Pizza, Inc. v. City of Wilkes-Barre, No. 01-480, 2006 WL 2460881, at *17 (M.D. Pa. Aug. 23, 2006) (quoting DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 597 (3d Cir. 1995)). Moreover, **a state provides adequate procedural due process when it "affords a 'full judicial mechanism' with which to challenge administrative decisions** ... regardless of whether the plaintiff avails herself of that appeal mechanism." Desi'z Pizza, 2006 WL 2460881, at *17 (quoting

> Midnight Sessions, Ltd. V. Phila., 945 F.2d 667, 680 (3d Cir. 1991))". Emphasis added.

In *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000), the court stated:

> "If there is a process on the books that **appears to provide due process**, a plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. See McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir. 1995; Dwyer v. Regan, 777 F.2d 825, 834-35 (2d Cir. 1995), modified on other grounds, 793 F.2d 457 (2d Cir. 1986); Riggins v. Board of Regents, 790 F.2d 707, 711-12 (8th Cir. 1986). Emphasis added.

Ms. Gibson has never "skipped" any process (inadequate or otherwise) in any efforts to get a "full judicial mechanism" for the review of the Sheriff's termination of her employment. There was a process listed in § 1-7G-3O, Ada County Code (A.C.C.) (p. 47a) of the Ada County Personnel System (Merit System) which did appear to vest a procedural due process remedy in the format of a "full judicial mechanism", and she undertook that "mechanism" to appeal the decision of the Hearing Officer under § 1-7G-3O, A.C.C. (p. 47a) to the State district court, and to challenge that administrative decision, but the Idaho Supreme Court declared § 1-7G-3O to be constitutionally infirm and eliminated the "mechanism" and denied any procedural due process review.

The extensive record in this case illustrates Ms. Gibson availed herself of State court processes in an attempt to rectify the harm imposed on her by Ada County (Defendants-Respondents). The Fourth District Court, Ada County, Idaho and the Idaho Supreme Court have been called upon to provide due process, but have failed to do so. In her Federal Complaint, Gibson specifically alleged the processes in the Idaho courts were constitutionally inadequate to protect her employment property rights, and in accordance with *Zinermon*, 495 U.S. at 125-126, her procedural due process claim is actionable when the State failed to provide her due process.

The Ninth Circuit's opinion invalidates application of the U.S. Supreme Court's National Rule for which this Court has paramount need and exceptional importance to secure and maintain uniformity, and the Ninth Circuit opinion is contrary to existing opinions entered by other U.S. Courts of Appeals. U.S. Courts have affirmed a procedural due process violation occurs, and becomes **actionable**, when the State **fails to provide** due process. This Court will take notice of cases decided by ***U.S. Courts of Appeals***, identifying constitutional violations actionable under 42 U.S.C. § 1983, pursuant to the Supreme Court's holding in *Zinermon*. *See Licari v. Ferruzzi*, 22 F.3d 344 (1st **Cir.** 1994); *Rumford Pharmacy v. City of East Providence*, 970 F. 25 996 (1st **Cir.** 1992); *Lowe v. Scott*, 959 F.2d 323 (1st **Cir.** 1992); *Amsden v. Moran*, 904 F.2d 748 (1st **Cir.** 1990); *Alvin v. Suzuki*, 227 F.3d 107 (3rd **Cir.** 2000); *McDaniels v. Flick*, 59 F.3d 446 (3rd **Cir.** 1995); *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th **Cir.** 2008); *Tri County Paving, Inc., v. Ashe* County, 281 F.3d

430 (4th Cir. 2002); *Mallette v. Arlington Supplemental Retirement*, 91 F.3d 630 (4th Cir. 1996); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990); *Coggin v. Longview Independent School Dist.*, 337 F.3d 459 (5th Cir. 2003); *Coggin v. Longview Independent School Dist.*, 289 F.3d 326 (5th Cir. 2002); *Dailey v. Vought Aircraft Company*, 141 F.3d 224 (5th Cir. (1998); *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545 (6th Cir. 1992); *Sonnleitner v. York*, 304 F.3d 704 (7th Cir. 2002); *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994); *Colon v. Schneider*, 899 F.2d 660 (7th Cir. 1990); *Zar v. S.D. Bd. Of Examiners of Psychologists*, 976 F.2d 459 (8th Cir. 1992); *Kildare v. Saenz*, 325 F.3d 1078, at 1085-1086 (9th Cir. 2003); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 956 (9th Cir. 1991); *Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309 (11th Cir. 1995); and *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

When the Federal Court dismissed Ms. Gibson's Complaint and amended pleadings, and the Ninth Circuit affirmed that decision, it caused a conflict in this Court's national uniformity of the law, and if their decision is left to stand, Gibson will be deprived of her constitutional rights, in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and a state of confusion will linger within the judicial hierarchy as to what is the National Rule on this subject of this Due Process Clause.

CONCLUSION

The petition for a writ of certiorari must be granted, as the State judicial "mechanism" provided to Petitioner was inadequate.

Respectfully submitted,

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APPENDIX I – CIRCUIT ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC (3/31/08)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-35600
D.C. CV-05-00263-S-ELJ
District of Idaho, Boise

ORDER

Filed March 31, 2008

STACY A. GIBSON,

Plaintiff – Appellant

v.

ADA COUNTY, IDAHO; et al.,

Defendants – Appellees.

Before: FISCHER, GOULD, and IKUTA, Circuit Judges.

The panel has voted to deny the Petition for Panel Rehearing and to deny the Petition for Rehearing En Banc.

The full court has been advised on the Petition for Rehearing En Banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35.

The Petition for Panel Rehearing and the Petition for Rehearing En Banc are DENIED.

APPENDIX II- CIRCUIT UNPUBLISHED OPINION (2/14/08)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-35600
D.C. CV-05-00263-S-ELJ

MEMORANDUM[4]

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Submitted February 7, 2008**
Seattle, Washington

Filed March 31, 2008

STACY A. GIBSON,

Plaintiff – Appellant

v.

ADA COUNTY, IDAHO; et al.,

Defendants – Appellees.

Before: FISCHER, GOULD, and IKUTA, Circuit Judges.

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[4] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff-appellant Stacy Gibson appeals the district court's dismissal of her 42 U.S.C. § 1983 claim on alternative grounds of (1) claim and issue preclusion, and (2) the claim being time-barred. She also appeals the district court's denial of various post-judgment filings and its award of attorney's fees to appellees for those filings pursuant to 42 U.S.C. § 1988(b). We affirm.[1]

An Idaho court would preclude Gibson's current § 1983 claim on the basis of her earlier litigation in the Idaho state courts. *See Noel v. Hall*, 341 F.3d 1148, 1166 (9th Cir. 2003); *Diamond v. Farmers Group, Inc.*, 804 P.2d 319, 323 (Idaho 1990). Gibson's federal complaint alleges violations of her civil rights by appellees relating to her termination, culminating with the July 2, 2003 denial of a hearing by the Ada County Board of Commissioners. Gibson previously challenged the appellees' conduct culminating in the Personnel Hearing Officer's final decision to terminate her in *Gibson II*. *See Gibson v. Ada County*, 133 P.3d 1211, 1216, 1221 (Idaho 2006). Gibson previously challenged the Board's refusal to hear her appeal in *Gibson III*. *See id.* at 1216, 1222. Both cases involved the same parties as Gibson's federal case, or parties with sufficient privity for

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[1] Appellees' supplemental excerpts of record contain various filings from the Idaho court proceedings and are directly related to the issues on appeal. Gibson's motion to strike the supplemental excerpts of record is denied with appellees' suggested exception of the affidavits from the state court proceedings. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

claim preclusion to apply, *see* Idaho Code, §§ 31-602, 31-813; *Ticor Title Co. v. Stanion*, 157 P.3d 613, 618 (Idaho 2007), and resulted in a final judgment. *Gibson*, 133 P.3d at 1221-22.

Accordingly, Gibson's earlier state court litigation acts as an "absolute bar" to her current § 1983 claim. *See Hindmarsh v. Mock*, 57 P.3d 803, 805 (Idaho 2002) ("The doctrine of claim preclusion bars ...subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made."). We do not reach the district court's alternative bases [basis] for dismissing Gibson's claim.

Because Gibson's arguments relating to the post-judgment filings and related attorney's fees were not coherently developed in her briefs, we deem them abandoned and affirm the district court's order. *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (citing Fed. R. App. P. 28(a)(6).

Affirmed.

APPENDIX III – DISTRICT COURT ORDER GRANTING ATTORNEY FEES (4/24/07)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

MEMORANDUM ORDER

Filed April 24, 2007

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.,

Defendant.

Plaintiff Stacy A. Gibson ("Plaintiff") filed a complaint pursuant to 42 U.S.C. § 1983 for violation of civil rights and deprivation of due process against Ada County, Ada County Board of Commissioners, Ada County Sheriff's Office, and John and Jane Does I thru X (collectively "Defendants"). Defendants motion to dismiss the complaint was granted by order dated February 28, 2006. Subsequently, Plaintiff filed several motions and related documents including a motion to alter or amend judgment, a motion for leave to amend pleadings, an amended complaint, and an amended motion for summary judgment. By order dated June 6, 2006 the Court denied Plaintiff's motions and awarded Defendants costs and attorney fees incurred in responding to post-judgment filings.

On June 13, 2006, Defendants timely filed a petition for attorney's fees. Plaintiff responded to the petition and Defendants have filed a reply. The matter is ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, these motions shall be decided on the record before this Court without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(2)(ii).

FACTUAL BACKGROUND

Defendants have requested that this Court award attorney's fees in the amount of $3,318.00. This fee was computed at the rate of $105.00 per hour and represents the hours actually and necessarily spent as the result of Plaintiff's post-judgment filings.[1]

On July 3, 2006, subsequent to Defendant's petition for attorneys fees, Plaintiff filed a notice of appeal to the United States Court of Appeals.[2]

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[1] The affidavit of Ray J. Chacko (Dkt. #50) itemizes the tasks completed and the corresponding time spent on Plaintiff's post-judgment filings. The total time spent was 31.6 hours.

[2] The Court notes that Plaintiff's appeal to the circuit court does not affect this Court's jurisdiction to act upon Defendant's petition for attorney's fees. The Ninth Circuit has long held that event when a notice of appeal has been filed, "a district court in this circuit retains jurisdiction to rule upon a request for attorney fees." League of Women Voters of Cal. V. FCC. 751 F.2d 986, 990 (9th Cir. 1985).

STANDARD

Defendants request attorney's fees pursuant to 42 U.S.C. § 1988(b), Federal Rule of Civil Procedure 54(d)(2) and District of Idaho Local Rule 54.2. In a federal civil rights action or proceeding, "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). However, the district court's discretion to award attorney's fees under § 1988 has been narrowly construed. Ackerley Communications, Inc. v. City of Salem, Or., 752 F.2d 1394, 1396 (9th Cir. 1985), cert denied. 472 U.S. 1028 (1985). The district court's discretion is circumscribed by various decisions of the Supreme Court. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). The district court should clearly and concisely explain the grounds for its decision. See Hensley, 461 U.S. at 437.

DISCUSSION

Plaintiff objects to Defendants' petition for attorney's fees on essentially two fronts. First, Plaintiff claims the Court's order regarding the post-judgment filings and award of attorney's fees is factually unsupported and unjustified because Plaintiff had a right to file the pleadings pursuant to the prior Scheduling Order. Second, Plaintiff argues that the fees requested are unreasonable, and not substantially supported or justified.

I. Post-Petition Filings.

On September 30, 2005, the Court entered a standard scheduling order. The purpose of the order was to set deadlines for such matters as amendments to pleadings, disclosure of experts, final discovery, pre-trial motions and briefs, and other like items. In addition, the scheduling order tentatively set trial for this matter on January 23, 2007. Plaintiff claims that by virtue of this order, she had the right to file her motions and amendments notwithstanding the dismissal of her case the day before.[3] Plaintiff cites no legal authority in support of her position, and rightly so, because no legal authority exists. If the Court were to follow Plaintiff's logic, the Court must conclude that the parties had the right to proceed to trial on January 23, 2007 as indicated in the scheduling order, notwithstanding the fact that the case had already been dismissed. Such a conclusion is illogical and fails to provide a basis for Plaintiff's argument that the Defendants are not entitled to attorney's fees.

II. Reasonableness of Attorney's Fees

The Court finds the Plaintiff's arguments that the requested fees are unreasonable and not substantially supported or justified to be without merit and contrary to controlling case law. As previously noted, Congress has permitted an award of reasonable attorney's fees as part of costs in

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[3] The scheduling order set March 1, 2006 as the final deadline for amendments to pleadings. The case was dismissed in its entirety by order dated February 28, 2006.

federal civil rights actions. While § 1988 does not explicitly define what a reasonable attorney's fee is, the Supreme Court has adopted a "hybrid approach" to determine the same. See Pennsylvania, 478 U.S. at 564; Hensley, 461 U.S. at 433. This approach combines a multi-factor analysis with the lodestar calculation developed by the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973).[4]

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 at 433. The resulting figure may then be adjusted on the basis of other considerations such as the experience, skill, and reputation of the attorney requesting fees. See Pennsylvania, 478 U.S. at 564; Trevino v. Gates, 99 F.3d 911, 924 (9th Cir. 1996). However, a strong presumption exists that the lodestar figure represents a "reasonable" fee. Pennsylvania, 478 U.S. at 564.

In this case, the affidavit of Mr. Chacko in support of the Defendant's petition for attorney's fees itemizes the tasks completed and the corresponding time spent in responding to the post-judgment filings. The total amount of time spent was 31.6 hours. Plaintiff did not object to the amount of time spent by Defendants. Given the Plaintiff's failure to object, and in light of the 1,700 + pages of Plaintiff's

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[4] The lodestar is calculated by multiplying the hours spent by each attorney by a reasonable hourly rate. Pennsylvania, 478 U.S. at 563.

post-judgment filings, the Court finds the amount of time spent in this matter was reasonable. Thus, the Court turns its attention to the hourly rate.

Defendants have asked this court to award fees based on an hourly rate of $105.00. Plaintiff objects on the ground that the requested rate is excessive in light of the fact that Mr. Chacko is a government salaried employee and not privately retained counsel. Plaintiff claims that Defendants are not entitled to any more than reimbursement for the wages actually received, or roughly 20% of Mr. Chacko's monthly salary. To arrive at this figure, Plaintiff makes a simple calculation, taking the hours spent in this matter or 31.6 and dividing them by the estimated amount of time worked in a month of 160 hours.[5] Although this is a clever analysis, it is not the analysis adopted by the Supreme Court.

Plaintiff's argument that reference to private attorney rates is irrelevant in the calculation of attorney's fees where the litigation is handled by salaried government employees is incorrect. In reference to attorney's fees and the appropriate hourly rate, the Supreme Court declared that "[t]he statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." Blum v. Stenson, 465 U.S. 886, 888 (1984). See also, State ex rel. Corbin v. Tocco, 845 P.2d 513, 517 (Ariz. Ct.

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[5] Though not clearly articulated by Plaintiff, the Court assumes the 160-hour figure was arrived at based upon a 40-hour work week.

App. 1992) (holding that "[t]his rule [using the prevailing market rate as the reasonably hourly rate], used particularly in civil rights cases, ... provides that prevailing market rates and not the actual costs of legal services are the appropriate measure for an award of reasonable attorney's fees, even when the party being awarded the fees has been represented by salaried government or public non-profit counsel.").

The Defendants argue that the requested rate of $105.00 per hour is below the prevailing market rate in this community. Moreover, Defendants indicated that the Idaho Supreme Court recently allowed the Defendants to recover attorney's fees from the Plaintiff in similar cases using precisely the same hourly rate.[6] Therefore, in light of the foregoing, the Court finds the requested rate of $105.00 per hour to be a reasonable hourly rate and will use the same in calculating the proper amount of attorney's fees in this matter.

Accordingly, the Court finds the total fee amount of $3,318.00 is proper and reasonable.[7]

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[6] See Exhibits A and B attached to Mr. Chacko's affidavit referencing Idaho Supreme Court docket numbers 29694, 30976, and 31553.

[7] Having considered the factors set forth in Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert denied, the Court concludes that the present case does not represent one of those instances where the lodestar figure should be adjusted on the basis of other considerations. Harris v. Marhoefer, 24 F.3d 16, 18 (9th Cir. 1994).

ORDER

Based on the foregoing, and the Court being fully advised in the premises, it is **HEREBY ORDERED** that Defendant's Petition for Attorney's Fees (Dkt. #49) is **GRANTED** and Defendant's are awarded $3,318.00 in fees.

DATED: **April 24, 2007**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX IV – DISTRICT COURT ORDER DENYING MOTION TO ALTER JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

ORDER

Filed June 6, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.,

Defendants.

Pending before the Court in the above-entitled matter are Plaintiff Stacy A. Gibson's motion to alter or amend judgment, motion to amend motion for summary judgment, motion to amend pleadings, and other related filings. Defendants have responded to the motions and the time for filing a reply has expired. The matter is ripe for the Court's review.

Standard on Reconsideration

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider. However, the Ninth Circuit has stated that motions to reconsider should be treated as motions to alter or amend under Federal Rule of Civil Procedure 59(e). Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984). The scope and

purpose of such a motion have been analyzed as follows:

> Motions for a new trial or to alter or amend judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. (Citations omitted). These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. (Citations omitted). Moreover they cannot be used to argue a case under a new legal theory. (Citations omitted).

Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986);

> Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.
>
> ...
>
> [A] rehash of the arguments previously presented affords no basis for a revision of the Court's order.

Illinois Central Gulf Railroad Company v. Tabor Grain Company, 488 F. Supp. 110, 122 (N.D. Ill. 1980). Where Rule 59(e) motions are merely being pursued "as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under

Rule 59(e)" and must therefore be dismissed. Davis v. Lukhard, 106 F.R.D. 317, 318 (E.D. Va. 1984). See also, Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983) ("Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought—rightly or wrongly."). The Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1994). Upon demonstration of one of these three grounds, the movant must then come forward with "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Donaldson v. Liberty Mut. Ins. Co., 947 F. Supp. 429, 430 (D. Haw. 1996).

Federal Rule of Civil Procedure 60(b)(6), states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons ...(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6) (emphasis added). The Ninth Circuit has held that a party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." Community Dental

Services v. Tani, 282 F.3d 1164 (9th Cir. 2002) (citing Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th Cir. 1971) (per curiam); see also Pioneer Investment Servs. V. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 393 (1993). The party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion. Id., 282 F.3d at 1167 (citing United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993)). Clause 60(b)(6) is a "catch-all" clause that is read as being exclusive of the other grounds for relief listed in Rule 60. Id. at n. 8 (citing Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F. 2d 1334, 1338 (9th Cir. 1986).

Discussion

On February 28, 2006 the Court entered an order granting in part and denying in part Defendant's motion to dismiss. (Dkt. No. 34). The Court dismissed all of Plaintiff's claims and denied Defendants' request for attorney fees and entered judgment in favor of Defendants. (Dkt. No. 35). The following day Plaintiff filed the instant motions and related documents. (Dkt. Nos. 36-43, 46).

1) Motions to Alter or Amend:

The motion to alter or amend judgment and motion to amend asks the Court to vacate the judgment and allow Plaintiff to amend her pleadings and amend her motion for summary judgment and supporting materials, and file an amended response to Defendant's motion to dismiss. Plaintiff

subsequently filed an amended complaint and the requested amended memorandums. The filings are premised upon the same facts, arguments, and evidence as previously presented to the Court. Plaintiff has failed to point to any newly discovered evidence, clear error, or cite to a change in the applicable law. Accordingly, the Court denies the motion to alter or amend judgment and motion to amend summary judgment. As to the motion for relief pursuant to Rule 60(b), the Plaintiff has likewise failed to prove such relief is warranted.

Plaintiff's request to amend the pleadings is untimely. Judgment has been entered in this matter. Although Federal Rules of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires", "[l]iberality in granting a plaintiff leave to amend is subject to the qualification that the amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile. Additionally, the district court may consider the factor of undue delay." Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999 (citation omitted). Allowing an amended complaint at this stage in the proceedings is both futile and prejudicial to Defendants.

2) Defendants' Request for Costs and Attorney Fees:

Defendants have again requested that the Court award costs and attorney fees arguing the post-judgment filings are improper, frivolous, unreasonable, and a misuse of the judicial process requiring Defendant to incur further expenses. The

Court previously denied Defendants' request for costs and attorney fees on the grounds that Plaintiff's claim was brought before this Court in good faith and upon the belief that the claim was new cause of action under § 1983. (Dkt. No. 34). While that may have been true at the time, the instant motions and filings are wholly frivolous and without support in fact or law.

In a § 1983 action, attorney fees are awarded to a prevailing defendant pursuant to 42 U.S.C. § 1988(b) only "unreasonable, frivolous, merciless, or vexatious." Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994). As the Court previously stated in its order granting the motions to dismiss the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive...[in] setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard." In Christiansburg Garment Co., the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how hones one's belief that he has been the victim of discrimination, no

> matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing the suit.

434 U.S. at 421-22. The Plaintiff's post-judgment filings here are entirely unreasonable and Defendants are entitled to and awarded costs and attorney fees incurred as a result of the post-judgment filings by Plaintiff.

ORDER

Based on the foregoing and being fully advised in the premises, Plaintiff's motions (Dkt. Nos. 36 and 38) are **DENIED**. Defendants are awarded costs and attorney fees incurred in responding to the post-judgment filings by Plaintiff.

DATED: **June 6, 2006**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX V – DISTRICT COURT JUDGMENT (2/28/06)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

JUDGMENT

Filed February 28, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.,

Defendant.

Based upon this Court's Memorandum Decision and Order, dated February 28, 2006, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing from the Defendants and this case is **DISMISSED IN ITS ENTIRETY.**

DATED: **February 28, 2006**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX VI – DISTRICT COURT MEMORANDUM DECISION & ORDER (2/28/06)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

MEMORANDUM DECISION & ORDER

Filed February 28, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.,

Defendant.

Pending before the Court in the above-entitled matter are Defendants' motion to dismiss, Plaintiff's motion for summary judgment, and related motions. The motions have been fully briefed and are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, these motions shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

Factual and Procedural Background

On July 5, 2005, Plaintiff Stacy A. Gibson filed a complaint alleging civil rights violations pursuant to 42 U.S.C. § 1983 seeking compensatory, consequential, and punitive damages. (Dkt. No. 1). The complaint alleges Ms. Gibson was denied her right to procedural due process, equal protection, and the right to judicial access by Defendants Ada County, Ada County Board of Commissioners, Ada County Sheriff's Office, and employees and/or agents of Ada County (collectively "Ada County"). Generally the claims relate to a dispute over Ms. Gibson's payroll receipts and ultimately her termination of employment as an Ada County Sheriff's Office Jail Technician. Ms. Gibson alleges Ada County denied her rights and entitlements to pursue due process, administrative review procedures, and access to the courts so as to prevent her from challenging the allegations regarding her employment and termination. Ms. Gibson claims the Defendants' continual denial of her due process rights culminated in the final decision by the Ada County Board of Commissioners denial of her request for administrative review on July 2, 2003. It is from this final decision that Ms. Gibson alleges her cause of action before this Court arises and when she knew or had reason to know of her injury. Ms. Gibson also acknowledges in her complaint that there are three cases pending on appeal before the Idaho Supreme Court involving similar parties but different claims. The Idaho Supreme Court, however, has recently resolved those appeals in favor of Defendants.

Gibson v. Ada County, et al., ___ P.3d ___, 2006 WL 299061 (Idaho 2006).

Standard of Law

1) 12(b)(1):

A Defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) in one of two ways. See Thornhill Publ'g Co., Inc. v. General Tel & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). The attack may be a "facial" one where the defendant attacks the sufficiency of the allegations supporting subject matter jurisdiction. Id. On the other hand, the defendant may launch a "factual" attack, "attacking the existence of subject matter jurisdiction in fact." Id. When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). A "factual" attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1987); Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987). When considering a factual attack on subject matter jurisdiction, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing Thornhill, 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence

of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill, 594 at 733 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction ... where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting Augustine, 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." Augustine, 704 F.2d at 1077 (citing Thornhill, 594 F.2d at 733-35). This case does not require the Court to resolve substantive issues in determining whether jurisdiction is proper.

2) 12(b)(6):

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. See Clegg v. Cult

Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. See United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963).

Analysis

Defendant's motion to dismiss asserts the complaint should be dismissed in its entirety based on the Rooker-Feldman Doctrine, issue/claim preclusion, and the statute of limitations. In addition Defendants seek costs and attorney fees. Ms. Gibson opposes the motion arguing her claim before this Court is timely filed and distinct from the issues raised before the state court.

1) Issue/Claim Preclusion:

Defendants argue the claims raised in the complaint are precluded by *res judicata* and/or collateral estoppel because they have already been litigated in state court. Ms. Gibson maintains the state court matters are not the same "substance or subject matter of her claimed injury in this Federal suit, as those actions preceded the accrual of this Federal subject matter constitutional violation raised in this suit." (Dkt. No. 8, p. 2). In particular, Ms. Gibson notes the state court matters involve events preceding the July 2, 2003 denial by the Ada County Board of Commissioners of her request for administrative review; from which Ms. Gibson argues her federal claims arise. This denial, she claims, resulted in "a new civil rights violation, creating a new cause of action" and is the final overt act of continuing misconduct resulting in damages for which she now seek relief. Thus, Ms. Gibson concludes that the cause of action alleged here has "never been raised as a cause of action and prayer for a damage claim" in any of the state court cases which concern earlier constitutional violations. (Dkt. No. 8, p. 7).[1] In reply, Defendants point out that one of Ms. Gibson's state court cases was filed on July 30, 2003, after the July 2, 2003 denial which she claims gives rise to her federal cause of action now before this Court.

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[1] Ms. Gibson also notes that the state court cases were not "final" judgments as the state Supreme Court had not yet issued a decision. Since the time of the filing of her response brief, however, the state Supreme Court has issued a decision in favor of Defendants in those cases.

Section 1983 actions must afford full faith and credit to state judicial proceedings such that *res judicata* and other preclusion doctrines may operate to limit or exclude cause of action in federal court. See Strong v. Department of Correction, 2006 WL 47358 *2 (D. Idaho 2006) (citations omitted). "To determine whether a state judgment should have preclusive effect in a federal action, federal courts apply the state's rules governing preclusion." Id. (citation omitted). The Idaho Supreme Court has stated that "*Res judicata* is comprised of claim preclusions (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." Lohman v. Flynn, 78 P.3d 379, 386 (Idaho 2003) (citations omitted); see also Coeur d'Alene Tribe v. Asacrco Inc., 280 F. Supp.2d 1094, 1117-19 (D. Idaho 2003) ("Although the literal definition of the term *res judicata* is expansive enough to cover both preclusion of relitigation of the same cause of action and relitigation of the same issue, the modern tendency is to refer to the aspect of the doctrine that precludes relitigation of the same issue in a separate cause of action as collateral estoppel, and to refer to that aspect preventing relitigation of the same cause of action as *res judicata*." (quotations and citations omitted)).

"*Res judicata* thus applies to protect litigants from the burden of litigating the same cause of action with the same party or its privity." Coeur d'Alene Tribe, 280 F. Supp.25 1094, 1117-19 (D. Idaho 2003) (citing

Hindmarsh v. Mock, 57 P.3d 803 (Idaho 2002)). *Res judicata* "bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386 (citing Hindmarsh, 57 P.3d at 805 (citations omitted)). For *res judicata* to preclude litigation the following requirements must be met: (1) the same claim or cause of action arising out of the same facts must be involved in both suits; (2) there must be a final judgment on the merits in the prior action; and (3) the parties in the instant action must be the same as or in privity with the parties in the prior action in question. Coeur d'Alene Tribe, *supra* (citations omitted). "The purposes of these judicially created rules are to conserve judicial resources, protect litigants from multiple lawsuits, and foster certainty and reliance in legal relations." Id. (citation omitted).[2]

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[2] The Idaho Supreme Court has recognized that the three fundamental purposes served by *res judicata* are:

> First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims. The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386.

As to collateral estoppel, the Idaho Supreme Court has delineate[d] five factors that "must be considered in determining whether collateral estoppel will act as a bar":

> 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.

The complaint filed here present the same claims, arguments and issues as those raised in the state court causes of action. This is evident from the pleadings and briefings filed in the state court matters cumulating [culminating] with the Idaho Supreme Court's recent decision on those cases and the record in this case. In her briefing here, Ms. Gibson argues the state court matters are distinct in that they affect issues of employee rights, privileges, protections, and guarantees under FLSA but do not address due process and equal protection as to the July 2, 2003 denial by the Board of Commissioners. Further, Ms. Gibson claims that the state court matters do not seek a claim for damages nor cause of action for due process and equal protection violations occurring as a result of the July 2, 2003, denial. These distinctions are untenable. The Idaho

Supreme Court's opinion acknowledged that Ms. Gibson's complaint does not specifically allege due process but stated "this does appear to be part of her argument on appeal. She maintains that the Board's refusal to grant review of the hearing officer's decision constitutes an ongoing deprivation of her due process rights." Gibson v. Ada County, *et al.*, 2006 WL 299061*7. This is the very issue raised here. The fact that her argument has been raised and litigated, is particularly evident from Ms. Gibson's position here that while the July 2, 2003 event gives rise to her "new" claim, Ms. Gibson maintains that this "new" claim includes the conduct of all Defendants fro all previous ongoing misconduct as it is all continual violations of her due process; thus incorporating the entirety of her claims previously raised. It is clear from the pleadings, briefing, and records and, in particular, the Idaho Supreme Court's opinion, that the position pursued by Ms. Gibson here incorporates and is the same as that taken, argued, and fully litigated in the state court.

There has been final judgments on the merits as to the issues in each of those state cases. See Gibson v. Ada County, *et al.*, ___ P.3d ___, 2006 WL 299061 (Idaho 2006). The question then becomes whether there was there privity between Ms. Gibson and the Defendants in this matter. "Even when the parties are not identical, privity may exist if there is substantial identity between the parties, that is, when there is sufficient commonality of interest." Coeur d'Alene Tribe v. Asarco Inc., 280 F. Supp.2d 1094, 51117-19 (D. Idaho 2003) (quotations and citations omitted) (also citing Stratosphere

Litigation, 298 F.3d at 1142 n. 3 (finding privity when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved") (citation omitted); Shaw v. Hahn, 56 F.3d 1128, 1131-32 (9th Cir. 1995) (finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980) ("[A] 'privy' may include those whose interests are represented by one with authority to do so."). "[P]rivity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." Coeur d'Alene Tribe, *supra*. "[A] relationship of privity can be said to exist when there is an 'express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.'" Id. (quoting In re Schimmels, 127 F.3d at 881 and citing Alpert's Newspaper Delivery Inc. v. N.Y. Times Co., 876 F.2d 266, 270 (2d Cir. 1989) ("The issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis.) (citations omitted).

Privity between the parties exist here. Ms. Gibson is a party to each of the suits filed in state court and in this matter. Likewise, Ada County and the Ada County Sheriff's Office were expressly named in the state court cases and are named here. The Ada County Board of Commissioners, however, were not named in some [of] the state cases but are named as Defendants in the suit before this Court. The inclusion of the Ada County Board of Commissioners

does not leave the claim wanting for privity as there is a "sufficient commonality of interest" between the Defendants named in the state court actions and those named in the complaint filed here. Moreover, the Ada County Board of Commissioners was part of Ms. Gibson's state court action seeking judicial review of the Board's decision denying her request for a hearing. See (Dkt. No. 7, Ex. C) (Gibson v. Ada County, Fourth District Court Case No. CV OC 0305850D, filed July 30, 2002). In that action the state court denied her petition for judicial review because, as a matter of law, "[t]here exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decision of other elected County officers." Id. This ruling was upheld by the Idaho Supreme Court. See Gibson v. Ada County, ___ P.3d ___, 2006 WL 299061 *9 (Idaho 2006).

Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior state court actions between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted.

2) Statute of Limitations:

The statute giving rise to Ms. Gibson's cause of action, 42 U.S.C. § 1983, does not contain it own statute of limitations, "so courts borrow the most appropriate state statute of limitations." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 974 (9th Cir. 2004) (citation omitted). Section 1983 actions, therefore, apply the statute of limitation applicable

to personal injury claims. Id. (citing Wilson v. Garcia, 471 U.S. 261, 268, 276-80 (1985)). The parties do not dispute that the applicable statute of limitations here is promulgated in Idaho Code § 5-219(4) which provides a two year statute of limitation on personal injury claims. See Henderson v. State, 715 P.2d 978, 981 (Idaho 1986). The issue in this matter is whether the last overt act giving rise to the claim occurred on July 2, 2003, as Ms. Gibson argues, or whether it occurred outside the two year window as Defendants contend.

"In applying the statute of limitations to the case at bar ... federal law determines the 'last act' for purposes of tolling a state's statute of limitations." Henderson, 715 P.2d 981 (citing Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977)). "The generally accepted rule for ascertaining the 'last act' is provided in Cox v. Stanton, 529 F.2d 47, 50 (1975) [which states]: Federal law holds that the time of accrual [of a civil rights claim] is when plaintiff knows or has reason to know of the injury which is the basis of the action." Id.

Defendants argue Ms. Gibson's § 1983 claim was known or should have been known no later than February 15, 2000 when the Ada County Personnel Hearing Officer affirmed the Ada County Sheriff's decision to terminate her employment. Ms. Gibson maintains that the last act for purposes of the statute of limitations on her claim here was the Ada County Board of Commissioners' denial of her request for review on July 2, 2003. The Idaho Supreme Court recently determined that Ms. Gibson's § 1983 claim filed in one of her state court actions began February 15, 2000. Gibson v. Ada

County, *et al.*, 2006 WL 299061 *8 (Idaho 2006). The § 1983 claim before the state court involved Ms. Gibson['s] request for judicial review of Ada County's decision to terminate her employment. Before the Idaho Supreme Court, Ms. Gibson argued that the statute of limitations was tolled while she exhausted her administrative remedies and that the last act occurred on July 2, 2003 when the Board of Commissioners refused her request. Id. at *5.

Having reviewed the record, this Court concludes that Ms. Gibson knew or should have known of the injury giving rise to her § 1983 cause of action on February 15, 2000. This is evidenced by the complaint itself. Though the complaint couches the claim as one arising from the July 2, 2003 action of the Board of Commissioners, as distinct from the state claim which involved events prior to that date, Ms. Gibson's arguments before the Idaho Supreme Court were the same as those she has raised here involving the July 2, 2003 Board of Commissioners Decision. Further, Ms. Gibson's knowledge of her claims prior to July 2, 2003 is evident in the multiple law suits pursued in state court asserting these same claims and allegations against many of the same parties well prior to the filing of this new suit. Further, the complaint asserts that the all of the prior alleged violations are also incorporated in the claim and a basis upon which Ms. Gibson seeks recovery. To adopt Ms. Gibson's argument would allow the complaining party to simply decide when the statute of limitations begins. Such reasoning goes against the purposes of having a statute of limitations and result in the statute of limitations being tolled indefinitely until the complaining party

decides to file suit. Quit simply, repeated requests for review and repeated denials do not equate to tolling for purposes of statute of limitations. Ms. Gibson's complaint in this matter is untimely and barred by the two year statute of limitations. Accordingly, the Defendants' motion to dismiss is granted.

3) Costs and Attorney Fees:

Defendants' motion also includes a request for costs and attorney fees pursuant to § 1988 arguing Plaintiff's complaint is "frivolous, unreasonable, or without foundation." (Dkt. No. 7, p. 13). Ms Gibson argues her claims are genuine and meritorious again noting that the issues raised here are separate from those in the state court matters. In particular, Ms. Gibson notes that the Ada County Board of Commissioners are named as Defendants in this matter and were not named in the state court actions. Defendants assert the complaint in this action is merely the continuation of the same dispute between the parties and is precluded and in violation of the statute of limitations.

While the prevailing party in a § 1983 suit may recover attorney fees pursuant [to] 42 U.S.C. § 1988(b), a prevailing defendant in a § 1983 suit should be awarded attorney fees only when the action is "unreasonable, frivolous, merciless, or vexatious." Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994). An "award of fees under § 1988 to a prevailing defendant is unusual because the policy reasons behind the award of fees to a prevailing plaintiff are not present when a defendant

prevails. A district court in its discretion, however, may award a defendant in a civil rights suit attorney's fees under § 1988 when a 'plaintiff's actions was frivolous, unreasonable, or without foundation.'" Muzquiz v. W.A. Foote Memorial Hosp., Inc., 70 F.3d 422, 432 (6th Cir. 1995) (citation omitted). In deciding this issue, the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive ... [i]n setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard". In Christiansburg Garment Co., the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how hones one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a

party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22. In this case, although the Court has granted the motion to dismiss, Plaintiff's claim appears to have been made with the genuine belief that it raised a new cause of action under § 1983 for due process violations. To that end Plaintiff brought her § 1983 claim to this Court in an effort to challenge the process which she argues she was entitled to and denied by Defendants. The Court, while not agreeing with Plaintiff's theory, does not conclude that the claim was frivolous or unreasonable.

4) Other Motions:

As the Court's ruling granting Defendants' motion to dismiss is dispositive of this matter, all other pending motions are deemed moot. (Dkt. No. 9, 17, 20, 29). As to Defendants' motions to strike, the Court also finds those motions to be moot. (Dkt. No. 13, 27).

ORDER

Based on the foregoing and being fully advised in the premises, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss (Dkt. No. 7). The motion is granted as to the dismissal of all claims in the complaint against all Defendants. The motion is denied as to the request for attorney

fees. The remaining motions (Dkt Nos. 9, 13, 17, 20, 27, and 29 are **DEEMED MOOT.**

DATED: **February 28, 2006**

/s/ *Edward J. Lodge*
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX VII - DISTRICT COURT SCHEDULING ORDER (9/30/05)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

SCHEDULING ORDER

Filed September 30, 2005

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.,

Defendant.

With consideration being given to the agreements reached by the parties as set forth in the Litigation Plan Form and the Court being fully advised in the premises,

NOW THEREFORE, IT IS BEING ORDERED:

The telephonic scheduling conference set on October 5, 2005, is **VACATED**.

Amendment of Pleadings, Joinder of Parties and Pre-ADR Discovery: All amendments of pleadings, joinder of parties, except for allegations of punitive damages, and pre-alternative dispute resolution (ADR) discovery shall be completed on or before **March 1, 2006**. This deadline shall only be

extended for good cause shown. All parties are entitled to know the claims and parties well before trial. Although this deadline precedes the general discovery deadline, the parties are directed to send out all discovery requests that might relate to amendment, joinder or ADR well in advance of this deadline to obtain the responses needed to make an informal decision on amendment, joinder and/or resolution.

Disclosure of Experts: The Plaintiff shall disclose expert witnesses and the expected testimony of those witnesses on or before **March 1, 2006**. The Defendant shall disclose expert witnesses and the expected testimony of those witnesses on or before **April 3, 2006**. All rebuttal experts shall be disclosed on or before **April 17, 2006**. F.R.C.P. 26(a)(2)(B), as modified by Local Rule 26.2(b), shall be followed for all expert disclosures.

Final Discovery: All discovery shall be completed on or before **May 1, 2006**. Discovery requests must be made far enough in advance to allow completion of the discovery in accordance with the applicable federal rules prior to the discovery cut-off date. Failure to comply with discovery deadlines may result in the exclusion of evidence at trial.

ADR Conference: The parties shall participate in **mediation**. The parties shall meet, at a time and place agreeable to all, on or before **May 31, 2006**, with individuals who have settlement authority. The parties shall file with the court a joint written statement regarding the efforts and progress made

towards settlement within **seven (7) days** after mediation is complete. The report shall also state the parties' estimated trial time. Mediation is a non-binding process wherein the parties attempt to resolve their differences with the assistance of a third-party facilitator; the mediator. All proceedings in a mediation session are confidential and privileged from discovery.

Counsel for the parties are directed to contact Ms. Denise Asper, ADR Coordinator for this district, at 208-334-9067. Ms. Asper will provide information regarding the selection of a neutral, qualified mediator. The selected mediator will make the discretionary determination as to the exact date of the mediation session based upon the particular circumstances of the case and input from the respective parties. The mediator will also determine whether any follow-up mediation sessions are necessary.

Named parties shall be present during the entire mediation process in accordance with Section (m) of the Mediation Program Procedure for the District of Idaho. The parties shall make independent arrangements for payment of fees for the mediation. The costs of mediation are to be divided and borne equally by the parties unless agreed otherwise.

Pre-Trial Motions: All pre-trial motions, if any, shall be filed with the accompanying briefs on or before **May 31, 2006**. Response briefs, if any, to the motions filed on the pre-trial motions deadline, shall be due twenty-one (21) days from the receipt of the Motion. Reply briefs, if any, shall be due ten (10) days from the receipt of the Response.

Motions in Limine, if any, shall be filed thirty (30) days prior to trial. Response to motions in Limine, if any, shall be filed within fourteen (14) days from the filing of the motion.

The Court, upon a review of the pending motions, will determine whether a hearing is necessary. For any pre-trial motions filed prior to the deadlines set forth in this Order, the responsive briefing due date shall be those set forth in Local Rule 7.1.

Referral to Magistrate Judge: All non-dispositive pretrial matters are referred to Unites States Magistrate Judge Larry M. Boyle.

Witness Lists: Witness lists shall be filed fourteen (14) days prior to trial, unless otherwise ordered or agreed upon. Witness lists shall contain the material listed in Fed. R. Civ. P. 26(a)(3)(A)&(B), and shall include a brief description of the subject matter of the witnesses' expected testimony.

Exhibits and Exhibit Lists: The exhibit lists shall follow the guidelines set out in Local Rule 16.3. Plaintiff's Exhibits should be numbered and listed starting with "1." Defendant shall contact Ms. Carol Vaughn, In-court Deputy, 334-9022, to receive their exhibit numbers. If either side has multiple parties or numerous exhibits, contact Ms. Vaughn for number assignments. Each exhibit should be labeled with a color-coded sticker. (Yellow for plaintiff; blue for defendant. Stickers are available at the Clerk's Office, US courthouse.) The number of the exhibit and number of the case should be on all exhibits. A set or originally marked exhibits and a copy of the

exhibit list shall be delivered to Ms. Vaughn of the day of trial. Two complete sets of exhibit copies and exhibit lists should be submitted for use of the Court and staff attorney and a copy should also be delivered to opposing counsel. Impeachment exhibits will be marked, sealed and delivered only to the Court. Except for good cause shown, no exhibits or testimony will be received in evidence at trial unless presented in accordance with this order.

Pre-Trial Briefs: Trial briefs shall be exchanged between the parties and submitted to the Court within fourteen (14) days prior to trial. The Court is to be advised and briefed on all anticipated evidentiary problems before trial; no motions will be heard on the morning of a trial unless approved by the court in advance.

Jury Instructions: All proposed jury instructions are required to be filed and served at least fourteen (14) days prior to trial. The proposed jury instructions shall follow the guidelines set forth in Local Rule 51.1.

Proposed Voir Dire: All proposed voir dire questions are to be filed at least fourteen (14) days prior to trial. The Court will conduct voir dire of the jury panel. Counsel will be allowed to briefly question the jury panel following the Court's voir dire.

Trial Date: A **jury trial** shall begin on **January 23, 2007, at 9:30 a.m.** in the Federal Courthouse in Boise, Idaho.[1] The trial is tentatively scheduled for three (3) days. Thereafter, the trial shall be conducted from 9:00 a.m. to 4:00 p.m. A continuance for reason will be granted only upon a showing of extraordinary circumstances.

Court Trial Requirements: If the matter to be tried is changed to a court trial, suggested Findings of Fact and Conclusions of Law are to be submitted at least fourteen (14) days before trial. Attach an index directing the Court's attention to the evidence that will support the proposed findings or conclusions of law. A stipulation on all non-contested issues should accompany these documents.

Courtroom Conduct and Procedure: When appearing in this Court, all counsel (including, where the context applies, all persons at counsel table) shall abide by the following rules. Failure to abide may result in sanctioning by the Court:

1. Stand as Court is opened, recessed or adjourned.

2. Stand when jury enters or retires from the courtroom.

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[1] The parties are further advised that criminal matters may also be set on that date, which would supersede all civil settings; however, civil matters would commence in the order set at the conclusion of any criminal proceedings, if time allows.

3. Stand when addressing the Court. When making an objection, stand and state only the legal basis for the objection. If a response is necessary, be brief, without making a speech. If it is **critical** to the case that counsel be heard in more detail, a bench conference may be called to explain the basis for an objection. Otherwise, bench conferences will not be permitted.

4. Stand at the lectern while examining any witnesses; except that counsel may approach the witness for purposes of handling or tendering exhibits, with Court approval.

5. Stand at the lectern while making opening statements or closing arguments.

6. Address all remarks to the Court, not to opposing counsel.

7. Avoid disparaging remarks or acrimony toward opposing counsel and remain wholly detached from any ill feelings between the litigants or witnesses.

8. Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names.

9. Only one attorney for each party shall examine or cross examined each witness. The attorney stating objections, if any, during

direct examination, shall be the attorney recognized for cross examination.

10. Prior to testifying, counsel shall place before the witness all exhibits to which he or she will testify.

11. Diagrams or exhibits should be drawn or marked by the witness before taking the stand.

12. Any witness testifying at the time of recess or adjournment must be back on the witness stand when Court reconvenes. If a new witness is to be called, h/she must be standing in front of the witness box ready to be sworn.

13. In examining a witness, counsel shall not repeat or echo the answer given by the witness.

14. Gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any time, are absolutely prohibited.

DATED: **September 30, 2005**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX VIII – § 1-7G-3O, ADA COUNTY CODE

Either party shall have the right to appeal the decision of the Ada County Personnel Hearing Officer to the District Court of the Fourth Judicial District within sixty (60) days of the issuance of the written decision of the Ada County Personnel Hearing Officer. (Ord. 141, 8-29-85).

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FILED
SEP 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-130

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner.

v.

ADA COUNTY, IDAHO; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

Vernon K. Smith
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125

Counsel for Petitioner

QUESTION PRESENTED

The Ninth Circuit below affirmed the decision of the District Court, invalidating application of a National Rule for which this Court has paramount need and exceptional importance for securing and maintaining national uniformity in decisions. The Panel's decision has created a notable conflict with other existing opinions entered by the U.S. Supreme Court, the Ninth Circuit, and other U.S. Courts of Appeals with respect to when claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) are an "absolute bar" to a constitutional violation actionable under 42 U.S.C. § 1983. The question presented is:

Whether the procedural due process protection analysis announced under *Zinermon v. Burch*, 494 U.S. 113 (1990), precludes the use of the doctrines of *collateral estoppel* and *res judicata* as an absolute bar to a federal claim, when State courts fail to provide any adequate procedural due process remedy, particularly when the federal claim was embraced in a county ordinance (authorized by State law), intending to give a classified employee procedural due process remedies, but instead, was held "constitutionally infirm" by the Idaho Supreme Court, which has stripped Petitioner of her protected employment property rights guaranteed under the Fourteenth Amendment of the U.S. Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following caption contains the names of all the parties to this proceeding:

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, IDAHO, a political subdivision of the State of Idaho; ADA COUNTY BOARD OF COMMISSIONERS, acting in its official capacity; ADA COUNTY SHERIFF'S OFFICE, acting in its official capacity; AND JOHN AND JANE DOES I through X, inclusive, individually and in their capacities as officials, employees and/or agents of ADA COUNTY, IDAHO, and acting under color of State Law,

Respondents.

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INTRODUCTION

In the Complaint filed in the Federal District Court on July 5, 2005, Petitioner specifically identified her cause of action, to be as follows:

> "Defendants have deprived Plaintiff of her Constitutional and Statutory rights, under color of law, by denying Plaintiff the right to pursue procedural due process and to have right to access agency administrative review and judicial review of her employment property rights."

That particular cause of action was selected to demonstrate that Ada County (state actors), under color of law, deprived Ms. Gibson of a right guaranteed by the U.S. Constitution, as a matter of federal law. Since July 20, 1999, Ada County has committed a cascade of malicious acts, none of which has been rectified by any Idaho court, and that failure to provide a forum to address constitutional guarantees has set forth the stage for this Title 42 claim in federal district court, concerning their acts and conduct as follows:

> **(1)** Denial of procedural due process when unilaterally placed on administrative leave, without pay, by the Sheriff's Office, with no notice or hearing, deemed by federal law *de facto* termination when not providing procedural due process. *See Gilbert v. Homar*,

520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);

(2) Denial of procedural due process by refusing a pre-termination hearing, a prerequisite under federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) Denial of procedural due process by denying an opportunity to engage an unbiased post-termination hearing with an unbiased tribunal, as required by federal law;

(4) Denial of procedural due process by denying an administrative agency review to challenge the basis claimed to terminate Appellant's employment;

(5) Denial of procedural due process by failing to provide any forum for judicial review of the basis to terminate employment, either by Petition For Judicial Review to a lower court, appellate review to the Idaho Supreme Court, or Petition For Declaratory Judgment, Petition For Writ Of Mandamus, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce the "right of action" to

recover overtime and regular wages due Appellant, and seek redress for the retaliatory conduct when depriving Appellant federal statutory "right of action" under FLSA; and,

(7) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Civil Rights Act*, 42 U.S.C. § 1983, causing need to seek federal assistance.

The State of Idaho and its political subdivision, Ada County (state actors), denied Ms. Gibson any venue to review the taking of a property right, a procedural protection afforded by a constitutional due process right, and our Idaho courts have admittedly recognized they cannot provide any review or any venue to review the merits of Ms. Gibson's terminated employment, as the mechanism contemplated for that objective has been rendered to be "constitutionally infirm", and the Idaho Supreme Court has so forthrightly stated there is no available forum for review, and is not empowered to mandate such a right to review. Despite our attempts at (1) filing Petition for Judicial Review to a state court, (2) seeking appellate review to the Idaho Supreme Court, (3) filing Petition for Declaratory Judgment, (4) filing Petition for Writ Of Mandamus, and filing (5) Petition for Writ Of Certiorari to the Idaho Supreme Court, no form of any due process has been extended to Petitioner, and Petitioner's ability to exercise her right to procedural due process has been side-stepped and denied, as the Idaho Court has stated there is no available forum to get there, and

the Idaho Court will not mandate an agency (or lower court) to undertake that due process right, as the perceived mechanism structured in the County Ordinance for such purpose was flawed and void.

ARGUMENT ON NEW AUTHORITY

In order for Petitioner to state a claim for the failure of Ada County to provide a procedural due process remedy, she must have taken advantage of those processes that were available to her, unless those procedures were unavailable or patently inadequate. As the Court will note, Petitioner sought every avenue to obtain the procedural remedy, and got nowhere in Idaho. If Petitioner had simply refused to avail herself of those procedural mechanisms available to her, the County cannot be held to have violated due process requirements if it made procedural due process protection available. *See Akuma v. State*, Civil No. 07-1058 (JBS), page 5, U.S. District Court, D. New Jersey, **September 17, 2008**, therein citing *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982).

Petitioner was required to take advantage of the processes that were available to her in order to preserve and maintain her claim alleging the failure of Respondents to provide procedural due process. As this Court held in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), "A due process violation is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." "If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a

means to get back what he wants." *See Akuma v. State*, Civil No. 07-1058 (JBS), page 5-6, U.S. District Court, D. New Jersey, **September 17, 2008**, therein citing also *McDaniels v. Flick*, 59 F.3d 446, 460 (3d Cir. 1995); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000); *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

On February 9, 2006, the Idaho Supreme Court held in *Gibson v. Ada County*, 142 Idaho 746, 133 P.3d 1211 (**2006**) (Rehearing denied May 9, 2006), (page 757) that:

> "**This Court affirms** the district court's **decision to deny Gibson's Petition for Judicial Review** and adopt its findings that: "Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute. **There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decision of other elected County officers.**" Emphasis added.

CONCLUSION

Clearly, the Idaho Court has been given numerous times the opportunity (5 opportunities) to remedy the procedural failings of its subdivisions and agencies, by mandating the appropriate forum, be it the agency, their review board, or the State court itself, and having failed to remedy the procedural failings, these Respondents are now subject to a claim for this

procedural due process violation that **only** a Federal Court can remedy in this claim now before it, as again confirmed by the most recent holding of the concept in the Federal District Court of New Jersey. There could be no dispute the Idaho State court has provided no remedy to this procedurally flawed deprivation of a due process protected interest. The preclusion defenses do not apply, and the petition for writ of certiorari must be granted.

Respectfully Submitted,

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